

GEORGE HENKE
BEATRICE HENKE

IBLA 85-38 Decided May 29, 1985

Appeal from the dismissal of a protest against the offering of a tract for public sale.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Sales -- Public Sales: Generally -- Public Sales: Cancellation -- Rules of Practice: Appeals: Failure to Appeal

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

APPEARANCES: George and Beatrice Henke, pro sese.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On May 7, 1964, the NW 1/4 NE 1/4 Sec. 9, T. 6 N., R. 5 W., Mount Diablo Meridian, Napa County, California, was offered for public sale pursuant to 43 U.S.C. § 1171 (since repealed). 1/ A preference right bid of \$1,800 was received by the Sacramento Land Office of the Bureau of Land Management (BLM) from George R. Henke and Beatrice L. Henke, who also supplied satisfactory

1/ The former public sale statute, R.S. 2455, as amended, 43 U.S.C. § 1171 (1976), was repealed by sec. 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2790, 43 U.S.C. § 1701 (1982).

evidence of their ownership of adjacent land. By BLM's decision of June 15, 1964, the Henkes were declared the purchasers of the 40-acre tract.

By letter dated July 9, 1964, before a patent was issued, George Henke informed BLM that a timber trespass was in progress on the tract. This prompted BLM to conduct a field examination of the tract in August 1964. Apparently as the result of the investigation of the timber trespass (which was confirmed), and re-analysis of the classification of the land as suitable for disposition by public sale, it was determined that erroneous data was utilized in making the appraisal upon which the public sale was based.

BLM then proposed to re-classify the land as suitable for disposal under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), in the belief that the public interest would be better served if the tract were acquired by another owner of adjacent land, the San Francisco Lighthouse for the Blind. The Henkes successfully protested this proposed re-classification.

However, by its letter-form decision dated October 6, 1966, BLM vacated the public sale on the basis of the erroneous appraisal. The Henkes were advised in the decision that their \$1,800 purchase price would be refunded along with \$42 representing the charge for publication of the notice of sale. The decision expressly provided for the right to appeal from that decision within 30 days, and copies of the regulations relating to such appeals were provided the Henkes.

The record before us does not indicate that the Henkes availed themselves of their right of appeal. ^{2/} The statute under which the sale was conducted was repealed in 1976 (see n.1) and a new statute created a different legal authority for sale of certain public lands, 43 U.S.C. § 1713 (1982).

In 1984 BLM again listed the tract among several to be offered for sale pursuant to 43 U.S.C. § 1713, and provided the Henkes with notice of the sale, which was scheduled for August 29, 1984. The appraised fair market value was set at \$70,000.

The Henkes, presently living and working in the Republic of South Africa on a temporary basis, filed a protest against the offering of this tract for sale, contending that they are rightfully entitled to it by virtue of their qualification as purchasers at the 1964 sale. They offered to pay the original sale price.

By letter dated July 5, 1984, the California State Director, BLM, advised the protestants that the 1964 sale had been vacated because of discrepancies in the BLM field report and appraisal, and that they had been

^{2/} The entire record of the sale is not before us. A BLM memorandum in the record states that the original record, serial number SAC 075299, was closed and sent to the Federal Records Center, which destroyed it in 1968. However, in the absence of any allegation that an appeal was filed, we must assume that there was none.

afforded the opportunity to appeal at that time. He noted that the 1966 decision vacating the sale had included a commitment to notify them if the land were again offered for sale, and that this had been done.

The Henkes responded, reiterating their protest and asserting their superior claim to have the land conveyed to them.

The State Director then dismissed their protest by his letter dated August 14, 1984, noting that the tract had been withdrawn from the August 29, 1984 sale but that its sale would be re-scheduled, and advising them of their right to appeal.

The Henkes then filed this appeal. Essentially, it is their contention that the 1964 sale was wrongly vacated; that BLM had correctly recognized them as the qualified purchasers; that the sale was not vacated because of discrepancies in the field examination report and the appraisal discovered in consequence of the investigation, but, rather, because the disappointed bidder, the San Francisco Lighthouse for the Blind, had filed a petition to have the land classified for sale to it under the Recreation and Public Purposes Act after the public sale was held. The gravamen of their appeal is that in consequence of the 1964 sale, which they insist was wrongly vacated, they have a residual right to acquire the land. We cannot agree.

[1] When the Henkes failed to appeal the decision of October 6, 1966, vacating the sale, that decision became final for the Department. In Ida Mae Rose, 73 IBLA 97 (1983), we held that a prior decision of the Department will not be overturned by the Board of Land Appeals where a claimant has failed to appeal such decision and has, in essence, acquiesced to the decision for a prolonged period of time. This has been the consistent rule in a long line of cases.

Where there has been a failure to appeal, the right to subsequently contravene the factual determinations which served as the basis of the decision is waived. Nola Grace Ptasynski, 63 IBLA 240, 89 I.D. 208 (1982). When a party does not appeal, the doctrine of administrative finality, the administrative equivalent of res judicata, generally bars consideration of the same issue in a later appeal. Ida Mae Rose, *supra*; Virgil V. Peterson, 66 IBLA 156 (1982).

In a closely analogous case we held that a desert land applicant whose application was rejected because of an adverse classification, and who did not timely seek appropriate appellate review, lost whatever rights may have accrued to him by virtue of his application, and he thereafter could enjoy no preference right to the land when it was subsequently re-classified as suitable for desert land entry. Bruce C. Newcomb, 48 IBLA 263 (1980).

The rule has been applied to bar the claims of sovereign States as well as private parties. In White Castle Lumber and Shingle Co., Ltd., 32 IBLA 129 (1977), we said, "The erroneous decision will not be set aside where the State did not appeal and the decision has remained unchallenged for over 100 years * * *." See also State of Alaska, 22 IBLA 229 (1979).

Even where it is clear that the decision was erroneous, which is not apparent in this case, the rule applies. "One who fails to appeal from the

rejection of an oil and gas lease offer is not entitled to reinstatement of the application with priority over an intervening applicant, even though the rejection was erroneous." Betty Ketchum, 67 I.D. 40 (1960); Edward Christman, 62 I.D. 127 (1955). ^{3/}

Moreover, the statute which authorized the sale, R.S. 2455, 43 U.S.C. § 1171, has been repealed. Absent a "savings clause" in the legislation effecting a repeal, ^{4/} the repeal of a statute generally bars any subsequent conveyances thereunder to persons who have not fully perfected their right to the land. See Stu Mack, 43 IBLA 306 (1979) (townsite statute); Cf. Bumble Bee Seafoods, Inc., 65 IBLA 391 (right-of-way statute).

Appellants may bid for the land when it is again offered for sale pursuant to 43 U.S.C. § 1713, but they have no surviving residual rights to purchase the land by reason of their participation in the 1964 sale.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Gail M. Frazier C. Randall Grant, Jr.
Administrative Judge

Administrative Judge.

^{3/} Although it is inappropriate for this Board to now decide what result might have obtained had the Henkes appealed BLM's 1966 decision, it is noteworthy that in Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965), the Court held that until the Secretary issued a cash certificate, the Department was not obliged to sell the land to the high bidder even where he had been declared the purchaser by the land office manager, had paid the purchase price and been issued a receipt therefor, and the manager's declaration had been affirmed by the Assistant Secretary. See also Willcoxson v. United States, 313 F. 2d 884 (D.C. Cir.), cert. denied, 373 U.S. 932 (1963), which held, inter alia, that the Department is not precluded from changing a decision to sell on the basis of newly discovered facts after the sale has been held and the purchaser declared, and that no equitable title vested in such a declared purchaser when the purchase price was paid.

^{4/} The repealer does include a savings provision protecting valid existing rights under the statutes repealed, but whatever rights appellants may have asserted under the repealed statute were vitiated a decade earlier when the 1966 decision became final.

